IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2006 Session

WESTERN EXPRESS, INC. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Appeal from the Chancery Court for Davidson County
No. 03-3522-II Carol L. McCoy, Chancellor

No. M2005-00353-COA-R3-CV - Filed on July 11, 2007

This appeal involves a dispute regarding the application of the tree density requirements in Nashville's zoning code to an interstate trucking company's new facility. After the city refused to issue a use and occupancy permit for the facility because it did not comply with the tree density requirements, the company requested the Metropolitan Board of Zoning Appeals to find that the city should not have included the paved areas of its facility in its tree density calculations and to grant a variance for the remainder of the property. The Board declined to issue the permit or to grant a variance based on its belief that the company could satisfy the tree density requirements by making a one-time payment to the city's "tree bank" instead of planting additional trees at the site. The company filed a petition for common-law writ of certiorari in the Chancery Court for Davidson County. The trial court directed the Board to grant the variance after finding that the tree density requirements did not apply to the facility because the company had not removed existing trees from the site during construction and because the city had failed to properly establish a fee schedule for the tree bank. The city appealed. We have determined that the tree density requirements apply to all new developments regardless of whether trees were removed from the construction site. However, we have also determined that the city erred by including the paved area of the facility in its tree density calculations. In addition, we have determined that the Board's denial of the requested variance was arbitrary because it was based on its mistaken belief that the option of paying into the tree bank rather than planting new trees was available to the company. Finally, we have determined that the trial court erred by directing the Board to issue the variance rather than remanding the case to the Board for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Vacated in Part, and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

J. Brooks Fox and John Kennedy, Nashville, Tennessee, for the appellant, Metropolitan Government of Nashville and Davidson County, by the Board of Zoning Appeals.

John P. Williams and Thomas V. White, Nashville, Tennessee, for the appellee, Western Express, Inc.

OPINION

I.

In 2001, Western Express, Inc., a Tennessee corporation in the interstate trucking business, built a 28,000-square-foot headquarters building and two large maintenance and storage buildings at a 48-acre site in the Cockrill Bend Industrial Park in Davidson County. The company also paved thirty acres of land for tractor-trailer staging, loading, and parking areas. Prior to construction, the property essentially consisted of a large hill of limestone rock containing only scrub vegetation. Extensive blasting was necessary to prepare the site for development. The blasting lowered the elevation of the site by as much as sixty feet in some places, and the company used the voluminous shot rock created by the blasting as fill at the site.

Nashville's zoning code[1] contains provisions to protect the trees growing in Davidson County. Among other things, it requires persons constructing new commercial developments to achieve a specific average tree density per acre on their property. Western Express's new facility did not meet these tree density requirements. However, Nashville's urban forester reviewed the project and determined that it would not be feasible to plant the additional trees on the property because Western Express needed the thirty acres of unobstructed paved property to maneuver its trucks and because newly planted trees would not grow well in the compacted limestone shot rock.

As an alternative to planting additional trees on the perimeter of the property, the urban forester informed Western Express that it could satisfy its tree preservation obligations by paying $191,450 into Nashville's tree bank.[2] Western Express took issue with this decision on two grounds. First, it asserted that the urban forester could not require payments to the tree bank because the Metropolitan Council had not approved his fee schedule. Second, it took issue with the urban forester's calculation of the fee based on the entire 48-acre tract rather than only on the portions of the tract that were not exempt from the interior planting requirements. When Western Express declined to pay $191,450 into the tree bank, the zoning administrator declined to issue a use and occupancy permit for the headquarters building.

Western Express made three arguments when it appealed to the Board of Zoning Appeals. First, it asserted that the express exemption from the interior planting requirements in Metro. Code § 17.24.050(E) should also be deemed to be an implied exemption from the average tree density requirements. Second, it contended that it was entitled to a variance from the perimeter planting requirements because of the rocky conditions at the site. Third, it questioned the urban forester's

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[1] Code of the Metropolitan Government of Nashville and Davidson County, Tennessee § 17.04.010(A) ("Metro. Code") provides that the ordinance governing zoning in Nashville "shall be known as 'the zoning code for Metropolitan Nashville and Davidson County,' and may be cited and referred to herein as 'this zoning code.'" Accordingly, we will likewise refer to the ordinance governing zoning as the "zoning code."

[2] Metro. Code § 17.40.480 defines the "tree bank" as a "fund set up to receive monies from owners or developers who, for various reasons, remain unable to successfully plant and maintain trees on the site under development, with such monies to be used for the planting and maintaining of public trees."

authority to require a $191,450 payment in lieu of planting additional trees because the Metropolitan Council had not approved the fee schedule being used by the urban forester.[3]

There were few factual disputes at the hearing before the Board on September 18, 2003. The urban forester testified that the project lacked 547 tree density units based on the entire 48-acre tract. He also testified that it would not be feasible to plant additional trees at the facility because Western Express needed the thirty acres of unimpeded paved property for the staging, maneuvering, and parking of its trucks and because trees would not grow well in limestone shot rock. Because of these practical constraints, the urban forester informed the Board that he had decided to permit Western Express to pay $191,450 into the city's tree bank in lieu of planting the additional trees.[4]

Western Express did not take significant issue with the urban forester's calculations based on its entire 48-acre site. However, it insisted that the thirty acres of paved property that were exempt from internal planting requirements should have been excluded from the calculation of the tree density units required for the site. Western Express also presented evidence that it had planted 134 new trees and that, according to its calculations, it was only deficient fifty-three tree density units if the thirty acres of paved property were not included in the calculation.

The Metropolitan Government argued to the Board that granting Western Express a variance was unwarranted because its hardship was self-imposed and because the payment of $191,450 into the tree bank would obviate the necessity of planting additional trees. Western Express countered that ninety percent of its property should have been exempted from the tree density requirement, and it asserted that it was entitled to a variance for the remainder because of the harsh terrain. Western Express also disputed the Metropolitan Government's claim that it could satisfy the tree density requirement by making a one-time payment into the tree bank because the Metropolitan Council had never approved a fee schedule for it as expressly required by the tree density ordinance.

A majority of the Board concluded that Western Express was not entitled to a variance because it could satisfy the tree density requirement by making a one-time payment into the tree bank and because the Board was not authorized to grant a variance where financial gain is the sole basis for the request.[5] The Board also upheld the denial of the use and occupancy permit for the headquarters building. The Board's October 7, 2003 order denying the variance stated tersely that Western Express "HAS NOT satisfied all of the standards for a variance under Section 17.40.370 of the Metropolitan Code, due to the lack of hardship." The order did not contain substantive findings of fact supporting its conclusion that there was no hardship to Western Express, nor did it refer in any way to the putative tree bank alternative that formed the very basis for its decision.[6]

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[3] Metro. Code § 17.40.480 specifically requires the urban forester's fee schedule be approved by resolution of the Metropolitan Council.

[4] 547 true density units × $350 per unit = $191,450.

[5] Metro. Code § 17.40.370(D).

[6] The Board's reasoning can be discerned only by reviewing the hearing transcript.

On November 26, 2003, Western Express filed a petition for common-law writ of certiorari in the Chancery Court for Davidson County. The Metropolitan Government conceded for the first time in its response that the option of paying into the tree bank was not available to Western Express because the Metropolitan Council had not adopted a fee schedule for these payments. Nonetheless, the Metropolitan Government urged the trial court to uphold the Board's denial of the variance on the ground that any hardship to Western Express was self-imposed. Following a hearing, the trial court entered an October 7, 2004 order and a January 6, 2005 revised order concluding (1) that the tree density requirement does not apply to the project because Western Express did not remove any trees from the site, (2) that ninety percent of the property was exempt from the tree density requirement, and (3) that the Board's decision denying Western Express a variance with respect to the remainder of its property was arbitrary and capricious because it was based on a tree bank alternative that did not exist. The trial court ordered the Board to issue Western Express the requested variance within thirty days of the entry of its order. The Metropolitan Government has appealed.

II.

THE STANDARD OF REVIEW

The proper vehicle for seeking judicial review of a decision by a board of zoning appeals is a petition for common-law writ of certiorari. *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990); *Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 955 S.W.2d 52, 54 (Tenn. Ct. App. 1997). A common-law writ of certiorari is an extraordinary judicial remedy. *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001); *Fite v. State Bd. of Paroles*, 925 S.W.2d 543, 544 (Tenn. Ct. App. 1996). It is not available as a matter of right, *Boyce v. Williams*, 215 Tenn. 704, 713-14, 389 S.W.2d 272, 277 (1965); *Hall v. McLesky*, 83 S.W.3d 752, 757 (Tenn. Ct. App. 2001), but rather is addressed to the trial court's discretion, *Biggs v. Memphis Loan & Thrift Co.*, 215 Tenn. 294, 302, 385 S.W.2d 118, 122 (1964); *Blackmon v. Tenn. Bd. of Paroles*, 29 S.W.3d 875, 878 (Tenn. Ct. App. 2000).

Decisions to grant or deny a common-law writ of certiorari are reviewed using the familiar "abuse of discretion" standard. *Robinson v. Traughber*, 13 S.W.3d 361, 364 (Tenn. Ct. App. 1999). A reviewing court will not reverse the trial court's discretionary decision unless it has applied an incorrect legal standard, reached an illogical decision, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party. *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005); *Mercer v. Vanderbilt Univ.*, 134 S.W.3d 121, 131 (Tenn. 2004).

The trial court's authority in a proceeding for a common-law writ of certiorari is itself extremely limited. The writ permits the trial court to examine the administrative decision solely to determine whether the administrative body has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily, *Turner v. Tenn. Bd. of Paroles*, 993 S.W.2d 78, 80 (Tenn. Ct. App. 1999); *Daniels v. Traughber*, 984 S.W.2d 918, 924 (Tenn. Ct. App. 1998), and its review is limited to the record made before the administrative body unless it permits the introduction of additional evidence on the narrow issues before it. *Cooper v. Williamson County Bd. of Educ.*, 746 S.W.2d

176, 179 (Tenn. 1987); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn. 1983). The trial court may not: (1) inquire into the intrinsic correctness of the administrative body's decision;[7] (2) reweigh the evidence;[8] or (3) substitute its judgment for that of the administrative body.[9] *Hunter v. Metro. Bd. of Zoning Appeals*, No. M2002-00752-COA-R3-CV, 2004 WL 315060, at *2 (Tenn. Ct. App. Feb. 17, 2004) (No Tenn. R. App. P. 11 application filed).

Even if the trial court determines that relief is warranted, it has limited options for dealing with errors discovered in the proceeding under review. *Hunter v. Metro. Bd. of Zoning Appeals*, 2004 WL 315060, at *2; *421 Corp. v. Metro. Gov't*, 36 S.W.3d at 474. Because courts should avoid dictating specific decisions to local zoning boards except in the most extraordinary circumstances, the most common judicial remedy is to remand the case to the administrative body with instructions appropriate to the circumstances of the case. *State ex rel. Moore & Assocs., Inc. v. West*, No. M2003-00152-COA-R3-CV, 2005 WL 176501, at *3 (Tenn. Ct. App. Jan. 26, 2005), *perm. app. denied* (Tenn. Aug. 22, 2005); *Hunter v. Metro. Bd. of Zoning Appeals*, 2004 WL 315060, at *2. The trial court should not attempt to shoulder the local body's responsibilities and instead should insist that that body carry out its duties in an appropriate and lawful manner. *Hunter v. Metro. Bd. of Zoning Appeals*, 2004 WL 315060, at *2; *421 Corp. v. Metro. Gov't*, 36 S.W.3d at 475. The goal of a remand should be to place both the parties and the administrative body in the position they would have been in but for the administrative body's error. *Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 955 S.W.2d at 55.

III.

THE APPLICATION OF THE TREE DENSITY STANDARDS

The Metropolitan Government contends that the trial court misconstrued the applicable sections when it held that Western Express was not required to plant sufficient trees at its new facility to comply with the tree density standards because it did not remove any protected trees during the construction process. It insists that Chapters 17.24 and 17.40 require property owners who remove protected trees during the development of their property to replant a sufficient number of replacement trees to satisfy the required tree density standard of at least fourteen tree density units per acre. Despite Western Express's argument that this interpretation is "absurd" and "completely unreasonable," we have determined that the Metropolitan Government's interpretation of the applicable sections of the zoning code is correct.

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[7] *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Powell v. Parole Eligibility Review Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994).

[8] *Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980); *Hoover, Inc. v. Metro. Bd. of Zoning Appeals*, 924 S.W.2d 900, 904 (Tenn. Ct. App. 1996).

[9] *421 Corp. v. Metro. Gov't*, 36 S.W.3d 469, 474 (Tenn. Ct. App. 2000).

A.

The construction of local zoning codes presents a question of law which this court reviews de novo. *City of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 655 (Tenn. 2005); *Hargrove v. Metro. Gov't of Nashville & Davidson County*, 154 S.W.3d 565, 568 (Tenn. Ct. App. 2004). We employ the same rules of construction to interpret local zoning codes that we apply in construing state statutes. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 265 (Tenn. 2001); *Tenn. Mfr'd Hous. Ass'n v. Metro. Gov't of Nashville & Davidson County*, 798 S.W.2d 254, 260 (Tenn. Ct. App. 1990). Our goal is to ascertain and to give effect to the legislative body's intent without unduly restricting or expanding the scope of the code sections at issue. *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998); *Perry v. Sentry Ins. Co.*, 938 S.W.2d 404, 406 (Tenn. 1996).

The search for legislative intent begins with the text. *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 3 (Tenn. 1986); *Winter v. Smith*, 914 S.W.2d 527, 538 (Tenn. Ct. App. 1995). If a code section is unambiguous, we will enforce it as written. *See Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997); *Carson Creek Vacation Resorts, Inc. v. State*, 865 S.W.2d 1, 2 (Tenn. 1993); *Jackson v. Jackson*, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948). We consider the relevant code sections in the context of the code as a whole, *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998); *Cohen v. Cohen*, 937 S.W.2d 823, 827 (Tenn. 1996); *Gallagher v. Butler*, 214 Tenn. 129, 137, 378 S.W.2d 161, 164 (1964), and we give the words used in the text their natural and ordinary meaning, *Davis v. Reagan*, 951 S.W.2d 766, 768 (Tenn. 1997); *Westland West Cmty. Ass'n v. Knox County*, 948 S.W.2d 281, 283 (Tenn. 1997).[10]

In construing codes and ordinances, we are mindful of existing law. *Still v. First Tenn. Bank, N.A.*, 900 S.W.2d 282, 284 (Tenn. 1995); *First Nat'l Bank of Fulton v. Howard*, 148 Tenn. 188, 194, 253 S.W. 961, 962 (1923). We will avoid displacing existing legal rules and principles any further than the text itself expressly requires or necessarily implies. *In re Deskins' Estates*, 214 Tenn. 608, 611, 381 S.W.2d 921, 922 (1964); *Harbison v. Briggs Bros. Paint Mfg. Co.*, 209 Tenn. 534, 546, 354 S.W.2d 464, 470 (1962). We do not judge the wisdom or folly of the ordinance and will not substitute our own policy judgments for that of the democratically elected local legislative body. *Exxon Corp. v. Metro. Gov't of Nashville & Davidson County*, 72 S.W.3d 638, 641 (Tenn. 2002).

B.

The provisions relating to the protection, removal, and replacement of trees are found in two chapters of Nashville's zoning code – Chapter 17.24 and Chapter 17.40. These chapters, and their related definitions, must be read in pari materia. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005); *Faust v. Metro. Gov't of Nashville*, 206 S.W.3d 475, 489-90 (Tenn. Ct. App. 2006). In general terms, Chapter 17.24 contains requirements intended to address and remediate the past and

[10]The Metro Code contains a special rule for determining the meaning of the words used in the text. Metro. Code § 17.04.060(A) (1997) provides that "[w]here words have not been defined [in the code itself], the definition found in the most current edition of Webster's Unabridged Dictionary shall be used." Thus, in cases where a party's argument turns on the interpretation of words not specifically defined in the Metro Code, it is incumbent on the party to provide the courts with the relevant pages of the dictionary designated by the code.

continuing loss of Nashville's trees which are among the city's greatest natural resources. Chapter 17.40 contains the procedures that must be followed to remove or destroy a protected tree.[11]

Chapter 17.24 "establishes standards for the protection and replacement of trees to insure their continued presence and associated benefits." Metro. Code § 17.24.010. Included in Chapter 17.24 are provisions whose purpose is "to minimize the removal of protected trees" and "to ensure that developers take reasonable measures to design and locate the proposed improvements so that the number of protected trees to be removed is minimized." Metro. Code § 17.24.090. Metro. Code § 17.24.100(A) requires persons who remove or destroy protected trees to replace the trees at their own expense to meet the required tree density standard. Metro. Code § 17.24.100(B) defines the tree density standard as "at least fourteen units per acre."[12]

Chapter 17.40 prescribes the procedures that must be followed by persons who "remove or in any way damage" a protected tree. Unless exempted, Metro. Code § 17.40.440 requires these persons to obtain a permit from the zoning administrator and provides that any protected tree that is damaged, destroyed, or removed without a permit must be repaired according to accepted International Society of Arboriculture practices or replaced "with the equivalent density units of replacement trees as provided in Chapter 17.24." Chapter 17.40 also anticipates that circumstances could arise when a person removing protected trees will be unable to plant sufficient replacement trees to comply with the applicable tree density standards in Metro. Code § 17.24.100. In that circumstance, Metro. Code § 17.40.480 permits the person, in lieu of planting replacement trees, to make a payment to the tree bank equal to the cost that would have been incurred to provide the required density.

Depending on the circumstances surrounding the removal or destruction of a protected tree, the application for a permit required by Metro. Code § 17.40.440 must be reviewed and approved by the urban forester and the zoning administrator and, in some instances, by the planning commission. The decisions of the urban forester under these chapters may be appealed to the Board of Zoning Appeals. Metro. Code § 17.24.100(J).

C.

We begin with the text to determine the combined import of Chapter 17.24 and Chapter 17.40. Metro. Code § 17.24.100(B) provides that "[e]ach property shall attain a tree density factor of at least fourteen units per acre using protected or replacement trees, or a combination of both." Compliance is determined based on the gross acreage of the property minus the area covered with

[11] A protected tree is "an existing tree, exclusive of any prohibited tree, eight inches diameter breast height (DBH) or greater." Metro. Code § 17.04.060(B) (defining "Tree, Protected").

[12] The "units" referred to in Metro. Code § 17.24.100(B) are determined based on the diameter of a tree's trunk at breast height.

structures. Metro. Code § 17.24.100(B).[13] A "protected tree" is a tree eight inches in diameter or greater, and a "replacement tree" is a tree planted to close the gap between the number of trees onsite and the number required to meet the tree density standard. Metro. Code § 17.04.060(B). The same section that imposes the tree density requirement reiterates in conclusion that "[p]rotected and replacement trees shall contribute toward the tree density." Metro. Code § 17.24.100(B).

According to the plain language of Metro. Code § 17.24.100(B), "[e]ach property" must "attain" the specified tree density. This section makes no distinction between properties that had a tree density factor of fourteen units per acre or greater prior to construction and those that did not. In the latter case, additional planting will necessarily be required to achieve the specified tree density standard. Nothing in the text indicates that the Metropolitan Council intended to limit the affirmative planting requirement to cases where the property had a tree density factor of, say, eight units per acre prior to construction while wholly exempting properties with a pre-construction tree density factor of zero from its urban afforestation mandate.

The trial court found a textual basis for such distinctions in the subsection immediately preceding subsection (B). Metro. Code § 17.24.100(A) provides as follows: "Trees removed pursuant to Section 17.40.470 . . . shall be replaced at the expense of the developer to meet the required tree density standard." The trial court read Metro. Code § 17.24.100(A) as limiting the scope of Metro. Code § 17.24.100(B), in part because the court determined that the concept of tree "replacement" necessarily implies the removal of existing trees. While the placement of Metro. Code § 17.24.100(A) immediately before Metro. Code § 17.24.100(B) rather than after it is admittedly somewhat awkward, we do not think this happenstance compels the conclusion reached by the trial court.

The tree removal and replacement procedures in Metro. Code §§ 17.40.440 to .480 must be read in conjunction with the substantive tree protection and replacement provisions in Metro. Code §§ 17.24.090 to .120. The tree "replacement" obligations in Chapter 17.24 are much broader than the tree "replacement" procedures in Chapter 17.40. Metro. Code § 17.24.010 establishes "standards for the protection and replacement of trees to insure their continued presence and associated benefits" to the Metro community in general. It imposes on developers affirmative obligations to beautify a project site and mitigate the adverse environmental impacts of the development, including "the environmental impacts of large areas of unbroken pavement."

Moreover, while Chapter 17.40 is phrased in terms of a property owner's obligation to "maintain" a particular site's pre-construction tree density, Chapter 17.24 requires that "[e]ach property" must "attain" a tree density factor of fourteen units per acre. *Compare* Metro. Code § 17.40.470(A)(2) & .470(B)(8) *with* Metro. Code § 17.24.100(B). Thus, both the text and the structure of the provisions of Nashville's zoning ordinances that pertain to the protection, removal, and replacement of trees support the conclusion that Chapter 17.40 addresses the removal and

[13] Where applicable, compliance is determined based on the gross acreage of the property minus the fenced area of any athletic field, the area of a lake or pond which is covered by water year round, and excluding open areas of golf facilities. Metro. Code § 17.24.100(B).

replacement of trees at particular sites, while Chapter 17.24 is intended to mitigate and remediate the past and continuing loss of one of Nashville's greatest natural resources – its plentiful trees.

According to Metro. Code § 17.40.440, protected trees cannot be removed or destroyed without first obtaining a tree removal permit. Metro. Code § 17.40.470(A)(2) requires that an application for a tree removal permit be accompanied by a tree survey unless the final site plan for the project shows that "the required tree density will be met" through the use of "new or existing protected trees . . . which are to be installed or maintained as required to meet the tree density requirement." Metro. Code § 17.40.470(B)(8) prohibits the issuance of a tree removal permit unless the applicant demonstrates that "[t]he site will maintain the required tree density after the removal of specified trees either with existing protected trees or with the installation of new trees."

These provisions from Chapter 17.40 undermine, rather than support, the trial court's interpretation of Metro. Code § 17.24.100. First, the zoning code specifically addresses the removal and replacement of existing trees from particular sites in an entirely different chapter of the zoning code. Moreover, the language of Chapter 17.40 itself further undermines the trial court's conclusion. Metro. Code § 17.40.470(A)(2), for example, provides that an application for a tree removal permit must be accompanied by a tree survey unless the final site plan for the project shows that "the required tree density will be met" through the use of "new or existing protected trees . . . which are to be installed or maintained as required to meet the tree density requirement." The same subsection prohibits the issuance of a tree removal permit unless the applicant demonstrates that "[t]he site will *maintain* the required tree density after the removal of specified trees either with existing protected trees or with *the installation of new trees*." Metro. Code § 17.40.470(B)(8) (emphasis added). Thus, the type of one-for-one tree "replacement" envisioned by the trial court is addressed by the zoning code elsewhere, and not in Chapter 17.24. Indeed, Chapter 17.24 expressly states that it does "not apply to . . . the removal or destruction of trees," language mirrored in the provisions of Chapter 17.40.

Metro. Code § 17.24.100(A) serves a purpose other than limiting the scope of the tree density requirement imposed by Metro. Code § 17.24.100(B). Metro. Code §§ 17.24.100(C) and (E) give the city the discretion to include in its calculations regarding tree density healthy "prohibited trees" preserved by the developer during construction and protected trees the developer has relocated onsite. Metro. Code § 17.100(A) serves the similar, though not identical, purpose of making it clear that the city must count trees planted by the developer to comply with a Chapter 17. 40 tree removal permit in determining the property's post-construction tree density.

The most straightforward reading of Metro. Code § 17.24.100(B) is that it imposes an affirmative duty of afforestation on developments that have or will have a post-construction tree density factor of less than fourteen units per acre. Metro. Code § 17.24.100(A) does not limit the scope of the afforestation requirement and instead simply makes it clear that trees planted pursuant to a tree removal permit must be included in determining whether the developer has complied with the tree density requirement. Based on the zoning code's text and structure, we hold that the tree

density requirement of Metro. Code § 17.24.100(B) applies to all new developments, regardless of whether trees are or will be removed from the site during construction.[14]

D.

Western Express also argued, and the trial court held, that Metro. Code § 17.24.050(E) implicitly exempts ninety percent of the property from the tree density requirement. While we disagree with the trial court regarding the application of Metro. Code § 17.24.050(E) to this case, we have determined that the trial court was correct in concluding that the paved area of Western Express's facility that is used for tractor-trailer staging, loading, and parking should not have been included in the calculations of Western Express's compliance with the tree density requirements.[15]

There is no dispute that Metro. Code § 17.24.050(E) exempts Western Express's service loading areas and tractor-trailer staging, loading, and parking areas from the interior planting requirements in Metro. Code § 17.24.160. However, it is not Metro. Code § 17.24.050(E), but rather Metro. Code § 17.24.100(B) that specifically addresses the manner in which compliance with the tree density requirements should be calculated.

Metro. Code § 17.24.100(B) provides that

> [c]ompliance with this provision shall be calculated using gross acreage of the property minus the portion of the land area currently or proposed to be covered by structures, minus the fenced area of any athletic field, minus the area of a lake or pond which is covered by water year round, and excluding open areas of golf facilities.

This provision excludes portions of the property covered by structures. The zoning code defines "structure" as "anything constructed above or below ground." Metro. Code § 17.04.060. Paved loading areas and tractor-trailer staging, loading, and parking areas are certainly constructed above ground and, therefore, are "structures" for the purpose of Metro. Code § 17.24.100(B). Accordingly, the city should not have included these areas when it was computing the number of trees that Western Express would be required to plant to meet the applicable tree density requirements.

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[14] In the event a particular property will not support the required tree density because of its unique soil conditions or topography, the developer's legal recourse is to file an application for a variance from the tree density requirement with the Board of Zoning Appeals prior to construction. Only quite belatedly did Western avail itself of this option.

[15] The Court of Appeals may affirm a judgment on different grounds that those relied on by the trial court when the trial court reached the correct result. *Continental Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *Shutt v. Blount*, 194 Tenn. 1, 8, 249 S.W.2d 904, 907 (1952); *In re Estate of Jones*, 183 S.W.3d 372, 378 n.4 (Tenn. Ct. App. 2005); *Shoemake v. Omniquip Int'l, Inc.*, 152 S.W.3d 567, 577 (Tenn. Ct. App. 2003).

IV.
THE ARBITRARINESS OF THE BOARD'S DECISION

The Board's decision to deny Western Express's request for a variance and to require Western Express to pay $191,450 into the land bank is arbitrary for three reasons. The first reason, as we pointed out in Section III, is that the city did not properly calculate the number of trees Western Express would be required to plant in order to meet the tree density requirements applicable to this project. The second reason, as pointed out by the trial court, is the Board's erroneous belief that Western Express could satisfy the tree density requirements by paying into the tree bank instead of planting additional trees. The city induced the Board to make this mistake by vigorously advancing the tree bank as a viable alternative during the proceedings before the Board. However, once the case reached the courts, the city conceded that payments into the tree bank were not an option because the Metropolitan Council had not approved the urban forester's fee schedule as required by Metro. Code § 17.40.480. The third reason that the Board's decision was arbitrary is that it ignored the urban forester's undisputed testimony that attempting to plant trees on the remaining portions of Western Express's property would be unwise because most of this area was "inhospitable to tree growth."[16]

After concluding that the Board had acted arbitrarily by denying Western Express's application for a variance, the trial court directed the Board to grant the variance forthwith rather than remanding the matter to the Board for further action. In the absence of extraordinary circumstances, reviewing courts in cases like this one should avoid shouldering a local zoning agency's responsibilities and should insist that the agency carry out its task in an appropriate manner. *421 Corp. v. Metro. Gov't*, 36 S.W.3d at 475. Thus, the most common remedy is to remand the case to the agency with instructions appropriate to the circumstances of the case. The goal of the remand is to place the parties and the agency in the position they would have been in had the agency not acted improperly. *Hoover v. Metro. Bd. of Zoning Appeals*, 955 S.W.2d at 55.

The Board is far better equipped than either this court or the trial court to determine in the first instance whether Western Express is entitled to a variance if, as the trial court correctly determined, the tree bank option is not available to Western Express. Thus, the trial court should have simply vacated the Board's order and remanded the case to the Board with instructions regarding the applicable law.

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[16] The Board's October 7, 2003 order denying the variance request stated merely that Western "HAS NOT satisfied all of the standards for a variance under Section 17.40.370 of the Metropolitan Code, due to the lack of hardship," without any further explanation. The Board's order fails to comply with the requirements in Metro. Code § 17.40.390 that "[a]ny board decision on a variance . . . *shall* . . . *include* substantive findings of fact relating to the specified review standards. . . . *In the denial of a variance . . . request, findings shall specifically identify the standards that were not met.*" (emphasis added). For this reason alone, the trial court should have vacated the BZA's order and remanded the matter to the BZA with instructions to comply with the express requirements of Metro. Code § 17.40.390. *State ex rel. Moore & Assocs., Inc. v. West*, 2005 WL 176501, at *3; *Hunter v. Metro. Bd. of Zoning Appeals*, 2004 WL 315060, at *2; *421 Corp. v. Metro. Gov't*, 36 S.W.3d at 474-75.

V.

We affirm the conclusion in the trial court's January 6, 2005 order that the Board acted arbitrarily in the manner in which it applied the tree density requirements to this project and in its denial of Western Express's application for a variance. We vacate the portion of the January 6, 2005 order directing the Board to grant the requested variance. We remand the case to the trial court with directions to enter an order vacating the Board's October 7, 2003 order and then remanding the case to the Board with directions to conduct further proceedings consistent with this opinion. We tax the costs of this appeal in equal parts to the Metropolitan Government of Nashville and Davidson County, Tennessee and to Western Express, Inc. for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.